UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. JETBLUE AIRWAYS CORPORATION and SPIRIT AIRLINES, INC., *Defendants*.	Civil Action No. 1:23-cv-10511-WGY

NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants JetBlue Airways Corporation and Spirit Airlines, Inc. ("Defendants") respectfully submit this Notice of Supplemental Authority to inform the Court of the recent decision by the U.S. Court of Appeals for the Fifth Circuit in *Illumina, Inc. v. FTC*, --- F.4th ----, 2023 WL 8664628 (5th Cir. Dec. 15, 2023), attached herewith as **Exhibit A** for the Court's reference. Although *Illumina* involves a different kind of Section 7 merger case – a vertical merger reviewed by the Federal Trade Commission under its administrative rules – the Court of Appeals' opinion discusses two points relevant here:

First, the *Illumina* Court rejected an argument, similar to one advanced by the Government here, that Defendants have the burden on rebuttal to "restore the pre-[merger] level of competition" or "negate the anticompetitive effects of the merger entirely." *Id.* at *13-14. The *Illumina* Court concluded that:

> The Commission held Illumina to a rebuttal standard that was incompatible with the plain language of Section 7 of the Clayton Act, which only prohibits transactions that will "substantially" lessen competition. 15 U.S.C. § 18. And this error pervaded the Commission's analysis of the Open Offer, as the

> Commission invoked the wrong standard in five separate instances. Specifically, the Commission held that Illumina was required to "show that the Open Offer would restore the pre-[merger] level of competition," *i.e.*, "*eliminate* Illumina's ability to favor Grail and harm Grail's rivals." In effect, Illumina could only rebut Complaint Counsel's showing of a likelihood of a *substantial* reduction in competition with a showing that, due to the Open Offer, the merger would not lessen competition *at all*. This was legal error.

Id. at *13 (emphasis in original); *see also id.* (explaining "the Government's proposed standard would effectively erase the word 'substantially' from Section 7" (quoting *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 133 (D.D.C. 2022)); Dkt. No. 450 at 22-23 (Defendants' Post-Trial Brief).

Second, consistent with Defendants' position in this case, the Fifth Circuit held that the Government's burden is to prove that the merger is "likely" to substantially lessen competition. *Illumina*, 2023 WL 8664628, at *4, *7, *10, *14 ("It is not enough that a merger might lessen competition – the FTC must show that the merger will probably *substantially* lessen competition." (quoting *FTC v. Microsoft Corp.*, --- F. Supp. 3d ----, 2023 WL 4443412, at *13 (N.D. Cal. July 10, 2023))); *see also* Dkt. No. 450 at 1. In contrast, the Government has argued that it need only show that the merger "create[s] an appreciable danger of such consequences in the future." Gov't Closing Slides at 3. The Fifth Circuit's decision is the latest in a long line of cases rejecting the standard advanced by the Government.

Dated: December 18, 2023

Respectfully submitted,

/s/ Elizabeth M. Wright

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Supplemental Authority, which was filed with the Court through the ECF system on December 18, 2023, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Elizabeth M. Wright
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